IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 409 of 1997

For Approval and Signature:

HONOURABLE MR.JUSTICE AKIL KURESHI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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NAYAK VISHNUKUMAR MOHANLAL - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR YV BRAHMBHATT for Appellant(s) : 1,
MS HB POONANI PUBLIC PROSECUTOR for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE AKIL KURESHI

Date : 07/12/2007

ORAL JUDGMENT

1.0 This appeal arise out of the judgment and order dated 31st March, 1997 rendered by the learned Additional Sessions Judge, Mehsana in

Sessions Case No. 103 of 1995.

2.0 The appellant was original accused who was charged with offences punishable under Section 363, 366, 376 and 379 of the Indian Penal Code. He was, though, acquitted for offences punishable under Section 376 and 379 of the Indian Penal Code was convicted for offences punishable under Section 363 and 366 of the Indian Penal Code and was sentenced to undergo simple imprisonment for a period of six months for each of the offences and to pay fine of Rs.200/- for each of the offences.

3.0 As per the charge Exhibit-11 framed against the appellant, the prosecution case was that on 11.08.1993, the prosecutrix aged below eighteen years was kidnapped by the appellant from the lawful guardianship of the girl by giving inducement. It was further alleged that the appellant committed forcible intercourse on the girl and thereby committed offence punishable

under Section 376 of the Indian Penal Code. It was also alleged that the appellant had taken away a silver pendant worn by the girl and thereby committed offence punishable under Section 379 of the Indian Penal Code.

4.0 As per the prosecution case, the prosecutrix had gone to the Asudev Mahadev Temple at village Jamla on 11.08.1993 with her mother. Her mother had gone inside the temple and the prosecutrix had stayed outside. When the mother came out, she found that the girl was missing. She inquired in the nearby areas, but could not find hear, and therefore, lodged the complaint. Ultimately, the prosecutrix and the appellant, herein, were found on 18.08.1993. The appellant was arrested and he and the prosecutrix were sent to the doctor for medical examination.

5.0 P.W.-1-Dr. Manisha Shah in her deposition at Exhibit-19 stated that she had examined the girl and found that there were no signs of

external injury. But, her hymen was totally ruptured. She could not spot the presence of sperm in her vagina. She opined that the girl was not subjected to sexual intercourse recently. She stated that she was given the history by the girl that the rape was committed on her on 11.08.1993.

5.1 In her cross-examination she agreed that the police was present when the examination of both the appellant and girl was carried out.

6.0 P.W.-2-Gitaben Naranbhai examined at Exhibit-26 was the mother of the girl who had lodged the complaint with the police. She stated that on 11.08.1993, she along with her daughter had gone to the fair at Asudev Mahadev Temple. She had gone inside the temple while her daughter had remained outside. Upon coming out, she found that the girl was missing. She inquired about the girl in nearby areas as also at the house of her relatives. She came to know through one Chinubhai that her daughter had runaway with the appellant.

She eventually lodged complaint with the police. She stated that her daughter was studying in Standard-XI.

6.1 In her cross-examination she stated that she is staying at Jamla since fifteen years and she frequently used to go to Asudev Mahadev Temple for 'Darshan'. The temple is at a distance of only five to ten minutes by foot from her house. Around the temple there is big ground covered by a boundary wall. Near the temple there are number of shops and stalls. She agreed that the shop owners know them personally. On the date of the incident there was festival of 'Janmasthmi' because of which there was a fair and on account of that, the temple area was very crowded. There was police arrangement also. She did not know whether her daughter had an affair with the appellant.

7.0 P.W.-6-Chinubhai Mahasukhlal was examined at Exhibit-35. He was the person who, as per the

case of the prosecution, informed the complainant that her daughter had runaway with the appellant. In his deposition, he stated that on the date of the incident about five thousand people were there in the fair. When he came out of the temple and went towards the garden, he saw that the prosecutrix and the appellant were sitting there.

7.1 In his cross-examination he stated that where the appellant and the prosecutrix were sitting, a large number of people could see them. He had seen the couple from a distance of about twenty feet. But, other persons of his village were much closer to them. He saw that they were talking to each other. But, he could not state as to what was the conversation.

8.0 P.W.-7-the prosecutrix was examined at Exhibit-36. Her testimony is vital. She stated that she was studying in Standard-XI in a school at Kalol. On the date of the incident she had

gone to the fair with her mother. Her mother had gone into the temple for darshan but she remained outside. The appellant was standing under a tree at that time. He called her by making a sign and when she went there, she was asked whether she wanted to come to visit a temple at Vagosana. She declined. The appellant, however, assured her that since he is distant relative, her mother would not scold her. She, therefore, accompanied the appellant to the road but did not find the sister of the appellant contrary to what was told to her. A rickshaw came there and the appellant asked her to sit in the rickshaw. When she refused, the appellant threatened her and told her that if she said anything he would kill her. In the rickshaw, she was brought to a guest house at Mansa by the name Apsara Guest House which is behind the bus stop. She was asked to stand outside and the appellant went inside. After sometime, she was called inside to sign the register. They had rented the room there. At night, the appellant forcibly had intercourse with her. From there she was brought to Kalol by

bus. Then she was brought to Shertha by rickshaw and thereafter by Maruti car to Ahmedabad. From Ahmedabad, she was taken to Vijapur and from Vijapur they went to Ambaji by bus and stayed at Natraj Guest House at night. There again the appellant had intercourse with her, against her wish. From there she was taken to Mount Abu by bus, after visiting temple at Ambaji. They stayed at Mount Abu and also visited Delwara Temple. They met brother of the appellant who is a doctor. They stayed at night at Banjara Hotel. They also went to sunset point in the evening. They had gone there walking. They, thereafter, came to Abu Road and then to Adalaj village near Kalol.

8.1 In her cross-examination she was confronted with a number of contradictions and more particularly her statement before the police. She agreed that when she was forced to sit in the rickshaw, there were many people around and at no point of time she raised any

alarm or called for help. At Ahmedabad also she was all alone for sometime but never thought of running away. In the bus also she never complained to any passenger or to the conductor. She admitted that before the visit to Ambaji temple she had a bath and washed her clothes.

9.0 Prosecution examined a number of witnesses including father of the prosecutrix and other panch witnesses as well as I.O.-Hitensinh Gumansinh Raol-P.W.-10 who was examined at Exhibit-42. However, it would not be necessary to take note of their depositions in detail.

10.0 From the above evidence it is abundantly clear that there was no force exerted on the prosecutrix either when she accompanied him from the fair or during the intercourse that they had. Hence, the learned Additional Sessions Judge had rightly acquitted the appellant of the charge under Section 376 of the Indian Penal Code. State is not in appeal. Even otherwise, I find

that the allegation that the appellant had intercourse with the prosecutrix forcibly is simply not possible to believe.

11.0 Even the theory that the appellant threatened the prosecutrix with dire consequences if she did not sit in the rickshaw, simply cannot be believed. From the evidence of the prosecution witness No.6 it has come on record that the incident took place at about 5:00 clock in the evening. The girl was found missing from fair where at least five thousand people were present. P.W.-2 mother of the girl stated that there were large number of people around the area and in fact police 'bandobast' was also available. It is therefore simply not possible to whisk away the prosecutrix nearly aged about seventeen years, against her wish. In fact, there are stark contradictions between the version of the prosecutrix herself and P.W.-6-Chinubhai Mahasukhlal about the exact manner in which she accompanied the appellant. As per the

prosecutrix, she was called by the appellant by sign and she was thereafter requested to accompany him outside where in a rickshaw she was made to sit against her wish. P.W.-6-Chinubhai Mahasukhlal stated that he saw the appellant and the prosecutrix sitting in the garden and they were talking and not only he but large number of other people could also see them. As per the complainant-mother of the prosecutrix there were shops and stalls around the temple and owners of the shops and stalls were known to them. At no point of time, the girl tried to raise alarm or resist a simple threat of the appellant. It is not even the case of the prosecution that the appellant was carrying any weapon or had any past criminal record of being a head strong person. Further version of the witness also destroys the prosecution story of the girl being forced to accompany the appellant. The couple stayed at several places in hotels, guest houses and private houses, in full public view. On the very first juncture the girl was taken to the guest house at Mansa, she waited outside when the

appellant went inside to complete the formalities. She was, thereafter, called inside and she signed the register of the guest-house. The couple then went to Kalol, to Shertha, to Ambaji and to Abu and all throughout they were traveling in public transport. They visited temples at Ambaji and Delwara. All of this would show that the prosecutrix was all throughout a willing partner to accompany the appellant and that she had gone away with the appellant on her own free will.

12.0 It is true that the girl was less than eighteen years of age when the incident took place. However, it has come on record that she was nearly seventeen years of age. She was studying in eleventh standard. She was, thus, a person of reasonable maturity and was able to understand the implications of her actions. If one discards the theory of force being used against her to accompany the appellant, nothing remains on record to bring home the charge of

Section 363 and 366 of the Indian Penal Code. The prosecution failed to establish that the girl was taken out of care of the legal guardians. Had it been the case of the prosecution and had it been established through leading reliable evidence that the appellant had enticed or lured the girl out of the care of her legal guardian by giving false promise, the situation would have been different. In the present case, no such case was put forth, no evidence led.

13.0 Under the circumstances, I have no manner of doubt that the appellant was wrongly convicted for offences punishable under Section 363 and 366 of the Indian Penal Code. His conviction is, therefore, set aside. He stands acquitted. The appeal is allowed. Bail bonds stand canceled. Fine paid, if any, shall be refunded.

(AKIL KURESHI, J.)

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